United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Nos. 75-4089, 75-4121

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN BROADCASTING COMPANIES, INC., *ET AL.*,
Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Intervenor,

v

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

ON PETITION FOR REVIEW AND APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board properly found that the Union restrained and coerced the Employers in violation of Section 8(b)(1)(B) of the

Act by threatening to blacklist and discipline and by fining and expelling from membership supervisory personnel who crossed Union picket lines to perform supervisory functions during a work stoppage.

2. Whether the Board abused its discretion by refusing to order additional remedial measures requested by the Employers, including extraordinary publication of the remedial notice and reimbursement of expenses incurred during intra-union disciplinary hearings.

STATEMENT OF THE CASE

No. 75-4089 is before the Court upon the petition of American Broadcasting Companies, Inc., CBS Inc., and National Broadcasting Co., Inc. (herein the "Networks") pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) to review an order of the National Labor Relations Board. The Association of Motion Picture and Television Producers, Inc. (herein the "Association") has been permitted to intervene. No. 75-4121 is before the Court upon application for enforcement of the same order pursuant to Section 10(e) of the Act. The petition to review and application for enforcement were consolidated by order of the Court on June 26, 1975. The Board's Decision and Order issued on May 23, 1975 and is reported at 217 NLRB No. 159 (A. 53-114, 122-128).[1] This Court has jurisdiction under Section 10(f) of the Act, since the Networks transact business within this judicial circuit.

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[1] "A." references are to the printed appendix containing the Board's decision and order, the Administrative Law Judge's recommended decision and order, the Second Consolidated Amended Complaint, the Answer to Second Consolidated Amended Complaint, and a Stipulation of Facts dated December 17, 1973. "Tr." references

(continued)

I. THE BOARD'S FINDINGS OF FACT

Briefly, the instant case involves the Board's findings that the Union restrained and coerced the Employers[2] in the selection of their representatives for the purposes of collective bargaining and grievance adjustment by threatening to blacklist and discipline and by disciplining supervisor-members of the Union who crossed picket lines to perform supervisory functions during a work stoppage. The Union admits that it threatened to discipline and disciplined the affected individuals but contends that such conduct did not unlawfully coerce the Employers. The Employers contend that the Board improperly refused to order certain additional remedial measures including extraordinary publication of the remedial notice and reimbursement of expenses incurred during intra-union disciplinary hearings.

A. Background

1. The general structure of the industry

At all times material herein, the Networks, the Association and QM Productions (herein "QM") were engaged in the production of motion picture and television films (A. 57; A. 5-6, 24). In the course of their

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[1] (continued) are to the transcript of hearings before the Administrative Law Judge; "GCX", "RX", and "AX" references are to the General Counsel's exhibits, the Union's exhibits, and the Association's exhibits, respectively. Relevant portions of the transcript, the General Counsel's exhibits, the Union's exhibits, and the Association's exhibits are reproduced in the photocopied appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] "Employers" refers collectively to all of the charging parties before the Board — the Networks, the Association and QM Productions.

business the Networks, the Association, and QM all employed writers to create the screenplays and teleplays for their films (A. 58, 70-71; A. 9-10, 24). The writers are represented for collective bargaining purposes by the Writers Guild of America, West, Inc. (herein the "Guild" or the "Union") (A. 58; A. 9, 24).

The Employers also employ persons in various capacities to oversee and manager the production of the films (A. 62-68). Such individuals include producers, directors, story editors, and high-level executives (A. 62-68, 123; A. 10-11, 24). A producer has primary responsibility for the production of motion picture or television films; this includes complete budgetary, personnel, and creative control for a given film (A. 62-63). The producer hires writers and reviews their progress, selects and employs a director, oversees the actual filming, and manages post-production phases of film making including marketing of the finished product (A. 62-63; Tr. 53-59, 84-87, 198-202, 266-271, 387-392, 417-419). The producer may work under the supervision of an executive producer who has overall responsibility for several current films or projects (A. 63-64; Tr. 60, 271-273). The producer may also be assisted by an associate producer in all phases of the project, and the latter also often supervises post-production work (A. 64; Tr. 60-61, 438-441, 561-567, 735-738).

A director has immediate responsibility for the actual photography of the film (A. 65). Directors work closely with producers in the selection of actors and technicians and direct such employees in performing their duties (A. 65; Tr. 62-66, 205-209, 394-396, 607-609). A story editor, also known as an executive story editor, or executive story consultant, surveys new written material, interviews writers and recommends them

for hire to the producer, directly supervises writers, and recommends discharge or "cut-off" if a writer's performance is unsatisfactory; while supervising a writer, a story editor will meet frequently with the writer to discuss and criticize the outline, screenplay, rewrite, or "final polish" produced by the writer (A. 66-67; Tr. 67-70, 160-163, 209-113, 469-471, 534-536, 567-572, 1247). Staff production executives serve as liaison between the Employers highest level management and the producers of each individual film (A. 123; Tr. 596-599, 640-645, 656-658, 839-846, 891-893).[3] Producers, directors, story editors, and production executives all share the additional vital function of attracting and retaining qualified writers to a particular employer or a specific film project (A. 75; Tr. 230-231, 471, 691-692, 846-847).

Producers, directors, story editors, and production executives also discharge management responsibilities with regard to collective bargaining and grievance adjustment (A. 62-67, 123). When a scene is photographed on location away from the studio, the producer negotiates and executes collective bargaining agreements with local labor unions (A. 63; Tr. 167-168, 559, 794). Producers are also called upon to resolve the wide range of grievances which arise during the production of a motion picture or television film (A. 63). Specifically, a producer may be required to settle union jurisdictional disputes, determine whether a binding commitment has been made to a writer, order a protesting actor to perform stunt work, review claims for extra pay, allocate disputed screen credits between

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[3] These executives include vice presidents, executive assistants to vice presidents, executives for publicity and promotion, supervising executives, story department managers, research directors, technical advisors, general programming executives, and film programs managers (A. 123; GCX 3).

competing writers, handle actors' demands for more elaborate dressing rooms, and resolve conflicts regarding actors' delivery of lines or cameramen's filming techniques (A. 62-63; Tr. 61-62, 165-166, 203-204, 236, 332-333, 335-336, 393-394, 399-401, 420-423, 439-440, 548-551, 560-561, 565-567, 735-738, 838, 850-853).

Directors and story editors share the producers' responsibility for settling or attempting to settle grievances arising in their particular areas of supervision (A. 65). Specifically, directors are frequently required to handle actors' complaints regarding special pay, absences, dialogue, dressing rooms, or set construction (A. 65; Tr. 235-236, 274-275, 395-396, 420-423, 608-609). Directors must also deal with camermen's complaints concerning proper photographing procedures (A. 65; Tr. 396). Story editors constantly resolve writers' complaints regarding creative revisions of written material and are initially responsible for handling writers' grievances concerning the allocation of screen writing credits (A. 66-67; Tr. 69, 209-211, 236, 313-314, 335-336, 470-471, 535, 570-571). Production executives settle grievances arising among employees of their own personal staffs and also resolve disputes which producers or directors cannot handle, particularly serious grievances involving leading actors or actresses (A. 123; Tr. 599, 641-645, 841-842, 892).

2. The hyphenate function

There are a number of multi-talented individuals in the industry who have the ability to function in one or more of the capacities ennumerated above in addition to writing (A. 59). These individuals are known as "hyphenates." Hyphenates may simultaneously perform a combination

of any of these functions on a project such as producer-director or director-writer; or they may perform one function on a project and the same or different functions on successive projects (A. 59; Tr. 237-244). A hyphenate's function on a particular project, when it is other than creative writing, is referred to herein as the hyphenate's "primary" function or capacity.

A substantial number of hyphenates are members of the Writers Guild since they occasionally perform, or have performed in the past, creative writing (A. 58-59).[4] Because hyphenates perform several functions, they also often maintain membership in several different unions simultaneously such as the Producers Guild and the Directors Guild, in addition to the Writers Guild (A. 77). These labor organizations represent them with regard to the performance of each of their multiple functions (A. 77; Tr. 184-185, 584).

B. The Union's collective bargaining agreement terminates and the Union prepares for a strike

Since 1970 the Union and the Employers had been parties to collective bargaining agreements prescribing the terms and conditions of employment of writers and hyphenates who performed writing functions (A. 58; A. 9-10, 24). Each agreement provided, *inter alia,* that "this Basic Agreement shall not, nor is it intended to cover the services of Producers,

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[4] Although many hyphenates have not performed creative writing for a substantial number of years, they maintain their membership in the Writers Guild apparently because it provides significant contacts with writer-members, a sense of pride in belonging to the organization and a wider range of capabilities, thus enhancing the hyphenate's usefulness to the employer (A. 97; Tr. 347, 557, 846-847).

Directors, Story Supervisors, or other persons rendering services in a bona fide non-writing capacity" (A. 69; GCX 2 p. 2, GCX 9 p. 2). Each agreement also listed eight editorial functions which producers, directors, and story editors could perform without functioning as "writers" under the agreement. These functions, collectively known as the "(a) - (h)" functions, are:

(a) Cutting for time,

(b) Bridging material necessitated by cutting for time,

(c) Changes in technical or stage directions,

(d) Assignment of lines to other existing characters occasioned by cast changes,

(e) Changes necessary to obtain continuity acceptance or legal clearance,

(f) Casual minor adjustments in dialogue or narration made prior to or during the period of principal photography,

(g) Such changes in the course of production as are made necessary by unforeseen contingencies (e.g., the elements, accidents to performers, etc.),

(h) Instructions, directions, or suggestions, whether oral or written, made to writer regarding story or teleplay. (A. 70; GCX 2 pp. 3, 7, GCX 9 pp. 3, 7)

On February 2, 1973 the Union notified the Association that negotiations for a new agreement were stalled and that it intended to terminate the 1970 agreement on March 4 (AX 8). Shortly after the notice was given, the Union distributed copies of 31 strike rules to all Union members, including hyphenate members who performed various primary functions in addition to writing (A. 72; A. 12-13, 24). Fifteen of these rules prohibited writing for struck employers; several other rules, particularly relevant to hyphenate members, placed broader restrictions on

member activities (A. 72-75). These restrictions included prohibitions against members' crossing the Union's picket lines, entering the premises of struck producers without prior approval of the Union, or acting in a manner that weakened the strike or was prejudicial to the Union; the rules also warned of penalties for violations (A. 73-75; A. 17-23, 24).[5]

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[5] In pertinent part the rules stated:

1. Any act or conduct which is prejudicial to the welfare of the Guild is subject to disciplinary action. Conduct tending to defeat a strike or in any way weaken its effectiveness is per se conduct prejudicial to the welfare of the Guild.

* * *

12. All members are prohibited from crossing a picket line which is established by the Guild at any entrance to the premises of a struck producer.

13. Members are prohibited from entering the premises of any struck producer for the purpose of discussion of the sale of material or contract of employment, regardless of the time it is to take effect. Members are also prohibited from entering the premises of any struck producer for the purpose of viewing any film. . . . Should a member find it necessary to visit the premises of a struck producer for any reason apart from the foregoing he should inform the Guild in advance of the nature of such prospective visit.

* * *

19. A member may not, during the course of a strike, conduct negotiations with a struck producer for financing the production of any of his literary material or scripts, or for his participation in such production on any capacity.

* * *

22. A member is chargeable with knowledge of all strike rules and regulations, . . . circularized through the mail to the membership and of any strike information made known, . . . through . . . trade papers, newspapers, radio broadcasts or telecasts. . . .

* * *

24. All members, regardless of the capacity in which they are working, are bound by all strike rules and regulations in the same manner and to the same extent as members who confine their efforts to writing.

(continued)

On February 9 Union official Michael Franklin notified all hyphenate Union members that a special meeting would be held on February 15 to discuss "those matters which hyphenate members consider pertinent in connection with the current negotiations and possible strike action" (A. 75; AX 1). Over 100 hyphenates attended the February 15 meeting where they were told that the strike rules would apply to hyphenates in any capacity (A. 75, 79; A. 13, 24, Tr. 375-376, 446-447). Union officials also telephoned hyphenates and warned that they would be disciplined and blacklisted if they worked during the impending strike (A. 75; Tr. 538-539, 739-740, 853-862, 895-897). During the Union's pre-strike preparations, hyphenate Herman Saunders, a writer-producer, submitted his resignation to the Union; the Union rejected the resignation in conformity with a Union policy requiring members to continue their

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5 (continued)

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26. The term "member" encompasses anyone admitted to the membership rolls of the Writers Guild of America, both West and East, and classified as either active or inactive, associate, withdrawn or suspended, whether in good standing or bad.

27. No member may be relieved of the responsibility for the payment of any fine, or from any disciplinary action resulting from any infraction of strike rules by offering his resignation from the Guild. Membership in any guild or union is not a voluntary association of parties but a binding contract between them which cannot be abrogated unilaterally by either party except under provisions of the Guild constitution or state or federal law. It should be noted that fines levied for infringement of strike rules are collectible in a suit of law.

* * *

30. No member shall work with any individual, including a writer-executive who has been suspended from Guild membership by reason of his violation of strike rules, in the event no disciplinary action was instituted against such person (A. 73-75; A. 17-23, 24).

memberships for at least 6 months following the end of negotiations (A. 60-61, 92; A. 30, AX 2-3).

C. The Strike

The collective bargaining agreements between the Employers and the Union expired on March 4 (A. 58; A. 9-10, 24).[6] The Union called a strike against the Association and QM on that date and against the Networks on March 29; Union picket lines were immediately established and maintained at the respective Employers' premises on these dates (A. 58; A. 11-12, 25). The strikes against QM, the Association and the Networks terminated respectively on March 17, June 24, and July 12 (A. 58; A. 11-12, 25).

Immediately prior to the strike, officials of the Association and the Networks met separately and agreed that hyphenates would be required to work in their primary capacity, but would not be asked to perform any writing during the strike (A. 77-78; Tr. 1312-1314, 1352). Shortly after the strike began, Association members and the Networks sent letters to their hyphenates advising them that they were expected to fulfill their contractual obligations to perform work in non-writing capacities during the strike (A. 77-78; A. 36-37, Tr. 1313-1314, 1319-1320, GCX 26-30). The Directors Guild and the Producers Guild also urged the hyphenates to continue performing their primary functions, warning that refusals

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[6] A collective bargaining agreement between the Networks and the Union covering freelance writers, as opposed to staff writers, had previously expired on February 13 (A. 10, 24).

to work would violate no-strike clauses in collective bargaining agreements executed by these unions covering non-writing work (A. 78-79; Tr. 612, GCX 16 E pp. 83-85, GCX 16 I pp. 32-33, GCX 16 O (May hearing) pp. 80-81, 99).

Some hyphenates joined the strike (A. 79; Tr. 614). Others crossed the Union's picket lines and continued performing their regular primary functions as producers, directors, story editors, and executives, including the adjustment of grievances (A. 79-80; Tr. 357, 611, 614, 855, 1353). The working hyphenates also continued performing the (a) - (h) editorial functions incidental to their primary capacities. However, the hyphenates did not perform any writing functions, as defined in the Writers Guild collective bargaining agreement, during the strike (A. 91-96; Tr. 432-434, 630, 634, 855, 870, 1352-1353, 1359, GCX 16 A p. 85, GCX 16 B pp. 23, 46-48, 51-56, GCX 16 D pp. 18, 21, 61-62, 64-65 GCX 16 E p. 46, GCX 16 F pp. 32, 62-65, 69-71, GCX 16 G pp. 54-57, GCX 16 H pp. 46-48, 84-86, GCX 16 I pp. 69-70, GCX 16 J p. 24, GCX 16 K pp. 33-34, GCX 16 L pp. 70-71, GCX 16 M p. 84, GCX 16 N pp. 31, 73-76, GCX 16 O (May hearing) pp. 95, 99, 136).

D. The Union threatens and disciplines the hyphenates.

Following the inception of the strike, the Union continued to make telephone calls and send telegrams to hyphenate members threatening discipline and blacklisting for crossing picket lines (A. 75, 92; A. 13-14, Tr. 315, 600, 610-616). On April 9 the Union mailed a strike bulletin to all Union members stating that hyphenates who were working during the strike

would be disciplined (A. 75, 92; AX 6). Five days later the Union issued a press release stating that internal union disciplinary charges had been filed against seven named hyphenates (A. 75-76; AX 4). The release stated that the charged hyphenates had been ordered to appear before a union trial committee and that "those convicted will appear on a 'Roll of Dishonor' . . . and be listed in Guild publications in perpetuity so that Guild members for years to come will never forget" (A. 76; AX 4). This statement was immediately quoted in news stories appearing in the Los Angeles Times and two trade newspapers, the Hollywood Reporter and the Daily Variety (A. 76; AX 4 (a-c)). At the same time the Union mailed a formal "Notice of Disciplinary Hearing and Charges" to each charged hyphenate member setting a date for trial and specifying the strike rules which had allegedly been violated (A. 80-81).[7] On May 7 the Union sent a letter to each member, including hyphenates, stating that Rule 30, which had forbidden members to work with any other member suspended or disciplined for violating strike rules, had been repealed (A. 76; AX 7). The letter explained that "members of this Guild do not wish to be part of any action which carries the odious implications of a 'black list'" (A. 76; AX 7).

During April, May and June the Union filed charges against seven additional hyphenates and conducted eleven hearings before union trial committees (A. 80-81).[8] On June 25, the Union's Board of Directors

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[7] The charged hyphenates were Executive Story Consultant Robert Blees, Executive Producer Cy Chermak, Director Michael Crichton, Producer Jon Epstein, Executive Producer John Mantley, Executive Producer Herman Saunders, and Executive Producer David Victor (A. 30-31, GCX 3-8, GCX 15C, GCX 15R).

[8] The newly charged hyphenates were Producer Hugh Benson, Executive Jerome Bredouw, Producer Thomas Leetch, Producer David Levinson, Executive Story Editor (continued)

issued decisions in five cases, finding that each charged hyphenate had violated the strike rules by crossing Union picket lines and entering the premises of a struck employer (A. 81-82). The Board of Directors ordered that the five convicted hyphenates be expelled from Union membership and be fined amounts ranging from $100 to $50,000 (A. 82).[9] Following a Union press release, articles detailing the expulsions and fines appeared on June 27 in the Los Angeles Times, the Hollywood Reporter and the Daily Variety (A. 82; A. 38-39, GCX 31-33).

Between July and November 1973, eighteen more hyphenates were charged with violating the strike rules (A. 81-82). Six hyphenates were brought before trial committees and five decisions were issued by the Union's Board of Directors (A. 81-82). The decisions all found the hyphenates guilty of violating the strike rules by crossing Union picket lines (A. 82). Four of the five convicted hyphenates were suspended from the Union for two or three years and fined between $100 and

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[8] (continued)
Frank Paris, Producer Albert Ruddy, and Executive Story Editor Coles Trapnell (A. 30-31, GCX 3, GCX 15A, GCX 15B, GCX 15G, GCX 15I, GCX 15J, GCX 15P, GCX 15S). Hearings were conducted on charges against Blees, Bredouw, Chermak, Crichton, Epstein, Mantley, Paris, Ruddy, Saunders, Trapnell, and Victor (A. 31-32, GCX 16A, GCX 16C, GCX 16D, GCX 16E, GCX 16I, GCX 16J, GCX 16K, GCX 16L, GCX 16M, GXC 16N, GCX 160 (May hearing).

[9] The convicted hyphenates were Blees, Epstein, Mantley, Saunders, and Victor; the charges against Bredouw were dismissed following trial (A. 82; A. 32, GCX 16C, GCX 17B, GCX 17D, GCX 17F, GCX 17G, GCX 17H). Mantley and Victor were each fined $50,000; Blees was fined $25,000; Epstein was fined $2,000; Saunders was fined $100 (A. 32; GCX 17B, GCX 17D, GCX 17E, GCX 17F, GCX 17G).

$10,000; the remaining convicted hyphenate was expelled from the Union and fined $10,000 (A. 82).[10]

The convicted hyphenates filed timely appeals with the Union and a special meeting of the Union's membership was convened on November 12 to consider the appeals (A. 82; A. 34-35). Prior to this meeting, the Union mailed to all members a notice announcing the meeting and a statement explaining the various penalties which the membership could impose; in describing the possible effects of expulsion the statement noted that "there is obviously a stigma attached to expulsion which might cause individual members of the Guild to refrain from working with such a person" (A. 35, RX 12). The same statement was redistributed on November 12 to all members attending the meeting (A. 35, GCX 24).

At the November 12 meeting the Union membership voted to reduce the fines against nine of the ten convicted hyphenates and to set aside

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10 The charged hyphenates were Executive Producer Philip Barry, Producer Robert Cinador, Producer-Director Barry Crane, Executive Producer-Story Editor Andrew Fenady, Executive Larry Gordon, Executive Jack Haley, Associate Producer Stephen Heilpern, Associate Producer Ronald Honthaner, Producer Roger Lewis, Producer Leonard Katzman, Director Philip Kaufman, Producer James McAdams, Producer Thomas Miller, Director Sam Peckinpah, Producer Martin Ransohoff, Producer William Roberts, Executive Mark Rosin, and Associate Producer Herbert Wright (A. 30-34, GCX 3, GCX 15D, GCX 15E, GCX 15F, GCX 15H, GCX 15K, GCX 15L, GCX 15M, GCX 15N, GCX 15O, GCX 15Q, GCX 15T, GCX 15U, GCX 15V, GCX 15W, GCX 18, GCX 20, GCX 21, GCX 22). Hearings were conducted on charges against Benson, Cinador, Crane, Levinson, and Roberts; a second hearing was conducted on further charges against Victor (A. 31-32, GCX 16B, GCX 16F, GCX 16G, GCX 16H, GCX 16O (May hearing)). Levinson was suspended for two years and fined $7,500; Cinador was suspended for three years and fined $5,000; Benson was suspended for two years and fined $100; Crane was expelled and fined $10,000 (A. 32, GCX 17A, GCX 17C, GCX 17E, GCX 17I, GCX 19).

their expulsions or suspensions (A. 82; A. 35, RX 15).[11] The Union's Board of Directors adopted the reduced fines, ranging from $19.79 to $3,883.48, at a November 20 Board meeting (A. 82; A. 35, RX 15). On December 7 the Union notified its members that all disciplinary proceedings involving the hyphenates would be stayed pending adjudication of the unfair labor practice charges in the instant case (A. 82; A. 35-36, RX 16). The reduced penalties and the stay of further disciplinary proceedings were reported in the November 27 and the December 7 issues of both the Hollywood Reporter and the Daily Variety (A. 38-39, RX 18-21).

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board (Members Jenkins and Penello, Member Fanning dissenting), found in agreement with the Administrative Law Judge, that the Union restrained and coerced the Employers in the selection of their representatives in violation of Section 8(b)(1)(B) of the Act by threatening to blacklist and discipline and by disciplining the hyphenates (A. 98, 122-124).[12] The Board's order requires the Union to cease and desist from

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[11] The membership did not consider the suspension and fine of Executive Producer Cy Chermak (A. 82; A. 34, RX 15).

[12] The Administrative Law Judge, noting that no production executives had actually been disciplined by the Union, found it unnecessary to determine whether the production executives were bargaining representatives under Section 8(b)(1)(B) and whether the Union's threats of discipline directed towards them violated Section 8(b)(1)(B) (A. 67-68). The Board affirmed the Judge's concurrent finding that the Union's threats to discipline as well as actual discipline of bargaining representatives violated the Act, held that the production executives were representatives under Section 8(b)(1)(B), and accordingly modified the Judge's decision by finding that the Union had also violated Section 8(b)(1)(B) by its threats of discipline directed towards the production executives (A. 98, 123-124).

the unfair labor practices found and from engaging in any "like or related" conduct (A. 108-109, 125). Affirmatively, the Board's order requires the Union to rescind all fines, suspensions, and expulsions imposed upon the hyphenates, to expunge all references to the discipline from Union records, to notify the hyphenates in writing of these actions, and to reimburse the hyphenates for fines levied upon them (A. 109-111, 125). The order also requires the Union to post an appropriate notice at its office and meeting halls, to mail a copy of the notice to each Union member, and to publish the notice in six consecutive issues of the Hollywood Reporter and the Daily Variety (A. 110-111, 125, 127-128).

The Board refused to order certain remedies requested by the Employers and the General Counsel. These remedies consisted, *inter alia*, of having the notice published in a general newspaper and the aforementioned trade papers for three weeks and requiring the Union to reimburse the hyphenates for reasonable expenses incurred in defending themselves at the Union's disciplinary trials (A. 106-107).

ARGUMENT

I. THE BOARD PROPERLY FOUND THAT THE UNION RESTRAINED AND COERCED THE EMPLOYERS IN VIOLATION OF SECTION 8(b)(1)(B) OF THE ACT BY THREATENING TO BLACKLIST AND DISCIPLINE AND BY FINING AND EXPELLING FROM MEMBERSHIP SUPERVISORY PERSONNEL WHO CROSSED UNION PICKET LINES TO PERFORM SUPERVISORY FUNCTIONS DURING A WORK STOPPAGE

Section 8(b)(1)(B) provides that "it shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." The statutory language and the legislative history make it clear that Section 8(b)(1)(B) bars a labor organization from bringing direct pressure on an employer in an attempt to dictate the selection of supervisors vested with collective bargaining and grievance adjustment authority. *Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 798-799 (1974) and cases cited therein.[13] It is also clear by now that Section 8(b)(1)(B) equally proscribes indirect union pressure against the supervisors themselves, through fines or other discipline, where that

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[13] As the Senate Report explained:

> "[A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."

S.Rep. No. 105, 80th Cong., 1st Sess., 21. 1 Legislative History of the Labor Management Relations Act, 1947, 427.

pressure may adversely affect the supervisor's performance of their representative functions. *Florida Power, supra,* 417 U.S. at 804-805. For, as the United States Court of Appeals for the District of Columbia Circuit has explained

> In enacting Section 8(b)(1)(B) Congress sought to prevent Union interference with an employer's control over its own representatives. Congress recognized that prior to the passage of the Taft-Hartley Act amendments to the National Labor Relations Act in 1947, many unions had taken it upon themselves to say that management should not appoint any representative who was too strict with the membership of the Union and through the enactment of Section 8(b)(1)(B) it endeavored to prescribe a remedy in order to prevent such interference. While this provision obviously proscribes *direct* restraint or coercion against an employer itself, it is clear that Congress also intended to prohibit *indirect* interference accomplished through the imposition of union discipline on an employer's representatives.

The Court further observed that it

> . . . is obvious that the Union's actions [in fining a supervisor] were impermissibly designed to change the Company's representative from one representing the viewpoint of management to a person responsible or subservient to the Union's viewpoint. The conduct of the Union could very well be considered as an endeavor to apply pressure on the supervisory employees of the Company, and to interfere with the performance of the duties which the employer required them to perform and to influence them to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired (emphasis in original).

Meat Cutters Union Local 81 v. N.L.R.B. (Safeway Stores), 458 F.2d 794, 798-799 (1972). Accord: *N.L.R.B. v. Sheet Metal Workers, Local Union No. 361 (Langston),* 477 F.2d 675, 677 (C.A. 5, 1973); *N.L.R.B. v. New Mexico District Council (Horner),* 454 F.2d 1116, 1118 (C.A. 10, 1972); *N.L.R.B. v. Toledo Locals Nos. 15-P and 272, Lithographers Union (Toledo Blade),* 437 F.2d 55, 57 (C.A. 6, 1971); *N.L.R.B. v. Sheet Metal Workers, Local Union 49 (General Metal),* 430 F.2d 1348, 1350 (C.A. 10, 1970); *Dallas Mailers Union, Local No. 143 v. N.L.R.B. (Dow Jones),* 445 F.2d 730, 735 (C.A.D.C., 1971), enforcing 181 NLRB 286 (1970).

While the Act thus limits union discipline of supervisors, it is also true that the reach of Section 8(b)(1)(B) is not so broad as to bar union discipline against a supervisor for performing any activity that might be said to be furthering management's interests. The test, in each case, as set out in *Florida Power, supra,* 417 U.S. at 804-805 is that:

> . . . a Union's discipline of one of its members who is a supervisory employee can constitute a violation of 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

Resolution of this question, however, "clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed." *Chicago Typographical Union No. 16 (Hammond Publishers Co. Inc.),* 216 NLRB No. 149, p. 4, 88 LRRM 1378, 1379 (1975). Thus, in *Florida Power, supra,* the Court held that Section 8(b)(1)(B) was not violated under this test where a union fined supervisor-members who crossed union picket lines during a strike to perform rank-

and-file struck work and where the supervisors "were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto." *Id.* at 805. In such circumstances the requisite coercive impact was absent since the union discipline would have no effect on the supervisors' representative functions:

> . . . There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties.[14]

The Supreme Court found it unnecessary in *Florida Power* to further define the perimeters of the test, the conduct there "clearly" falling outside its boundaries. *Id.* at 805. See *N.L.R.B. v. Rochester Musicians Ass'n Local 66,* 514 F.2d 988, 991-992 (C.A. 2, 1975). However, guidance as to when union discipline will adversely affect supervisors' representative functions may be gleaned from earlier Board and Court authority which were not passed upon in *Florida Power.* In *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications Inc.),* 172 NLRB 2173 (1968), the Board held that Section 8(b)(1)(B) was violated where a union fined supervisor-members for allegedly assigning work in violation of the collective-bargaining agreement. The Board reasoned that the natural and foreseeable effect of such discipline was that in interpretating the agreement in the

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[14] *International Brotherhood of Electrical Workers, AFL-CIO [Illinois Bell] v. N.L.R.B.,* 487 F.2d 1143, 1157 (C.A.D.C., 1973), *aff'd sub nom. Florida Power and Light Co. v. I.B.E.W.,* 417 U.S. 790 (1974).

future the supervisor would be reluctant to take a position adverse to that of the union. See also *Florida Power, supra,* 417 U.S. at 801.[15] In *Safeway Stores, supra,* the Court enforced a Board order finding that a union violated Section 8(b)(1)(B) by fining and expelling a supervisor for obeying a Company order to institute a new meat procurement policy which would have resulted in the loss of union jobs. It was not claimed in *Safeway Stores* that the procurement policy had anything to do with the supervisor's grievance settlement or collective bargaining functions; rather the discipline was imposed for the "performance of duties indigenous to his position as a management representative." 458 F.2d at 798. In these circumstances, the court agreed with the Board that the discipline would have the effect of adversely interfering with the performance of the supervisor's representative duties.[16] Moreover, in *Illinois Bell, supra,* the Court, in a decision affirmed by the Supreme Court, held that a union could lawfully discipline supervisors performing struck work, but expressly noted that discipline of supervisors performing supervisory duties intrudes into the realm of conduct proscribed by Section 8(b)(1)(B):

> . . . When a supervisor acts as such he is a representative of management, and as such he should be immune from

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[15] In *Florida Power* the Supreme Court assumed, without deciding, that the Board's *Oakland Mailers* decision fell within the outer limits of its test. *Id.* at 805. The *Oakland Mailers* decision has received the express approval of several reviewing courts. See *Illinois Bell, supra,* 487 F.2d at 1153, 1158; *N.L.R.B. v. Local 2150, I.B.E.W. (Wisconsin Electric),* 486 F.2d 602, 606-607 (C.A. 7, 1973), remanded, 418 U.S. 902; *Safeway Stores, supra,* 458 F.2d at 794; *Horner, supra,* 454 F.2d at 1118; *General Metal, supra,* 430 F.2d at 1350.

[16] Subsequently, in *Illinois Bell, supra,* the court reaffirmed its holding in *Safeway Stores,* stating that the decision there "was and remains directly tied to the principles *Oakland Mailers* properly implied from Section 8(b)(1)(B)." 487 F.2d at 1158.

> union discipline. The unions participating in the present cases conceded as much at oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work he remains immune from discipline. But when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. The dividing line between supervisory and non-supervisory work in the present context is sharply defined and easily understood. (emphasis in original). 487 F.2d at 1157.

See also *Dow Jones, supra,* 445 F.2d at 735 (discipline of supervisor who failed to file certain papers with union); *Horner, supra,* 454 F.2d at 1118 (discipline of supervisor who worked for a non-union employer and a supervisor who sent anti-union letter to employees and hired non-union employees); *Toledo Blade, supra,* 437 F.2d at 57 (discipline of supervisor who breached collective bargaining agreement); *General Metal, supra,* 430 F.2d at 1350 (discipline of supervisor who breached collective bargaining agreement); *Langston, supra,* 477 F.2d at 677 (discipline of supervisor who discharged unruly employee).

In sum, *Florida Power* and its antecedents teach that the focus of a Section 8(b)(1)(B) inquiry rests on the nature of the supervisors' duties when the discipline is imposed. Where supervisors cross picket lines to perform regular supervisory duties, union discipline violates Section 8(b)(1)(B) since it tends to deprive the employer of its supervisors' services – including their collective bargaining and grievance adjustment services – and because the supervisors would reasonably anticipate that union discipline would also be imposed if future performance of such functions did not meet with union approval. On the other hand where supervisors cross

picket lines to perform rank-and-file struck work, union discipline does not violate Section 8(b)(1)(B) since it merely deprives the employer of services normally rendered by strikebreaking replacement employees.[17]

Under these principles, the Board's conclusion here that the Union's threats and discipline directed towards hyphenate members coerced and restrained the employers in the selection of their representatives for grievance adjustment and collective bargaining is clearly proper. As shown in the statement, there is no real dispute that the affected hyphenates were supervisors who possessed and exercised the powers of grievance adjustment and, in some cases, collective bargaining.[18] Prior to the strike the Union warned hyphenates in published strike rules, by telephone calls, and at a special meeting that they would be disciplined if they crossed

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[17] This view draws further validity from the dissenting opinion in *Florida Power*, where Justice White observed:

> I do not read the Court to say that Section 8(b)(1)(B) would allow a Union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute. *Id.* at 818 n. 2.

[18] Before the Board the Union conceded, and the evidence shows, that executives, producers, and directors are supervisors as that term is defined in Section 2(11) of the Act and represent the Employers for the purposes of collective bargaining or grievance adjustment. The Board's finding that story editors function as statutory supervisors and Section 8(b)(1)(B) representatives is likewise supported by substantial evidence on the record as a whole. Thus, several witnesses testified that story editors effectively recommend the employment of qualified writers and the discharge of writers who prove unsatisfactory (Tr. 67-68, 210-213, 275-276, 470-471, 533-535, 567, 567-572). Seven witnesses agreed that story editors generally oversee the writers' work, criticize drafts, and advise writers of necessary changes to be incorporated in subsequent drafts (Tr. 67-69, 72, 209-212, 275-276, 349-358, 469-470, 570, 982-999). Finally, six witnesses testified that story editors resolve or attempt to resolve writers' grievances regarding screen credits, creative disagreements with management, editorial revisions, or any other difficulties a writer may encounter (Tr. 69-70, 212-213, 335-336, 471, 535-536, 570-571).

the Union's picket lines during the strike to perform their regular supervisory functions. The threatened discipline included fines, expulsion, and blacklisting, a form of discipline particularly onerous to hyphenates whose duties included in large part the ability to work and attract outstanding film writers. After the strike's commencement hyphenates crossing the Union's picket lines solely to perform their primary function were subjected by the Union to charges, were heavily fined and were expelled or suspended from membership.

Thus, the record in this case plainly shows that the Union disciplined supervisors who possessed and exercised the functions set out in Section 8(b)(1)(B) when these supervisors were engaged solely in the performance of supervisory tasks – including grievance adjustment. Since the hyphenates were acting exclusively as representatives of management and, indeed, were actually performing grievance adjustment functions, they were entitled to immunity from union discipline. *Illinois Bell, supra,* 487 F.2d at 1157. In these circumstances, the Board could reasonably conclude that the natural and foreseeable effect of the discipline would be a tendency by the hyphenates to avoid taking a position adverse to the Union on future occasions involving the exercise of their bargaining and grievance adjustment functions. *San Francisco Oakland Mailers Union Local No. 18 (Northwest Publications, Inc.), supra,* 172 NLRB at 2173. See also cases cited *supra* p. 20. For, having once been forced to side with the Union in a dispute totally unrelated to non-supervisory matters, their representation of the employers' interests would reasonably tend to be compromised whenever they performed supervisory duties that the Union might dispute, including grievance adjustment or collective bargaining. Moreover, since the Union refused to permit hyphenates to resign their membership, the

tendency of the discipline to affect the hyphenates' future performance of bargaining and grievance handling functions is significantly accentuated.[19]

Furthermore, even if the hyphenates did not view the present Union discipline as portending future discipline, the Union's action in threatening and disciplining the hyphenates would tend to have an immediate coercive effect upon the Employer's retention of their representatives for bargaining and grievance adjustment. The clearly foreseeable effect and, indeed, the avowed purpose of the Union's threats and discipline was to force the Employers' to operate without the hyphenates by coercing them to observe the Union picket lines and join the strike. Since the hyphenates were performing only supervisory functions during the strike, including grievance adjustment, the Union's action tended to or did deprive the Employers of the services of its grievance adjusters and first-line supervisors. The Union's conduct was thus no different from direct pressure on the Employers to remove these supervisors from work – conduct patently violative of Section 8(b)(1)(B). Indeed, as the Administrative Law Judge observed (A. 99):

> . . . [the Union's] action in this case violated the plain meaning of the statute without the necessity of resort to statutory

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[19] The rescission of most expulsions and suspensions and the reduction of most fines by the Union membership does not eliminate the coercive impact of the Union's actions. One hyphenate remains suspended, several substantial fines remain assessed, and charges against many other hyphenates are currently held in abeyance pending the outcome of this litigation. Nor is there any assurance that the Union's membership would vote to reduce future discipline imposed by its leadership. See *Toledo Locals No. 15-P and 272, Lithographers Union (Toledo Blade)*, 175 NLRB 1072, 1079 (1969), enf'd, 437 F.2d 55 (C.A. 6, 1971); *New York Typographical Union No. 6 (Daily Racing Form)*, 206 NLRB 294, 295 (1973).

> exegesis . . . . When [the Union] prevented or sought to prevent, such hyphenate members from going to work in their managerial and supervisory capacities as producers and directors during the strike, [the Union] obviously coerced and restrained their employers in the selection of those specific producers and directors for the purpose of collective bargaining and the adjustment of grievances of employees working during the strike within the plain meaning of the statute.

Under these circumstances, the Union therefore clearly violated Section 8(b)(1)(B) by restraining the Employers in the selection of their representatives for grievance adjustment and collective bargaining. See *New Mexico District Council (Horner II)*, 177 NLRB 500, 502 (1969), enf'd, 454 F.2d 1116, 1118 (C.A. 10, 1972); *Wisconsin River Valley District Council (Skippy)*, 218 NLRB No. 157, 89 LRRM 1477, 1478 (1975), petition to review pending (C.A. 7).

It is equally clear that the Union's conduct also amounted to direct pressure against the employers to employ in the future only hyphenates who respected the picket line and were thus acceptable to the Union, and hence violated Section 8(b)(1)(B) in this respect as well. Thus, as shown, *supra*, pp. 9-10, the Union's Strike Rule 1 made any conduct prejudicial to the to the Union or the strike subject to disciplinary action and Rules 12 and 13 essentially prohibited intercourse between Union members and struck employers. Strike Rule 30 established, in essence, a blacklist of disciplined members by forbidding any member to work with disciplined members. Taken together, these rules plainly constituted a threat to strike any employer who employed a blacklisted hyphenate. For, Union members would refuse to work with a blacklisted hyphenate thereby forcing employers to employ only Union approved hyphenates. Since the Employers

commonly selected hyphenates to perform supervisory functions including grievance adjustment and collective bargaining, this strike threat directly restrained and coerced the Employers in their selection of representatives in violation of Section 8(b)(1)(B).

Moreover, the Union communicated this threat to both the employers and the hyphenates. The strike rules were widely distributed and received considerable publicity in the local and industry media. Before and during the strike, Union agents personally warned hyphenates that they would be blacklisted if they crossed Union picket lines. The Union also caused articles to appear in local and trade newspapers threatening that hyphenates convicted of violating strike rules "will appear on a 'Roll of Dishonor' . . . and be listed in Guild publications in perpetuity so that Guild members for years to come will never forget." (AX 4.) Nor did the Union ever effectively rescind the threat. Although the Union formally repealed Rule 30 during the strike, contemporaneous statements to the press suggested that the threat of an informal blacklist remained. Thus, the May 10 edition of the Hollywood Reporter reported: "A Guild official who participated in the . . . revocation of Rule 30 said yesterday he was not certain whether plans for the roll of dishonor would be abandoned in view of the action to avoid the appearance of blacklisting" (RX 11). Thereafter, the blacklist threat was reiterated in the Union's post-strike letter to members describing the effects of expulsion from membership: "There is obviously a stigma attached to expulsion which might cause individual members of the Guild to refrain from working with such a person" (RX 12). Since these threats were widely disseminated and read throughout the industry it is clear that they were communicated to the Employers, who were thereby directly restrained and coerced in the

selection of their Section 8(b)(1)(B) representatives. See *N.L.R.B. v. Local 964, United Bhd. of Carpenters (Rockland Contractors)*, 447 F.2d 643, 645 (C.A. 2, 1971); *N.L.R.B. v. Local 294, Int'l Bhd. of Teamsters (K-C Refrigeration)*, 284 F.2d 893, 896 (C.A. 2, 1960); *N.L.R.B. v. Silver Bay Local Union No. 962 (Alaska Lumber)*, 498 F.2d 26, 28 (C.A. 9, 1974).

It is anticipated that the Union will argue that the Board's decision incorrectly interpets *Florida Power* and that *Florida Power* holds that a labor organization cannot violate Section 8(b)(1)(B) by disciplining supervisors for working during a strike. This claim is without merit. As we have shown, *supra* pp. 18-24, the Board's analysis in this case is totally consistent with the principles set out in *Florida Power*. The contrary result here is attributable, not to a legal analysis that conflicts with *Florida Power*, but to the differing factual setting.[20] Nor, does the Board's analysis

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[20] This is clearly shown by the heavy emphasis on the nonsupervisory nature of the work performed by the supervisors in *Florida Power*. Thus the Supreme Court stated that the issue presented in Florida Power was whether a union violated Section 8(b)(1)(B) when it disciplined "supervisor-members for crossing the picket lines *and performing rank-and-file struck work*" (emphasis supplied) 417 U.S. at 792. Similarly, in holding that the discipline was not unlawful, the Court emphasized that the disciplined supervisors (unlike the hyphenates here) "were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work." *Id.* at 805. See also Justice White's dissent. *Id.* at 815 n. 2. Moreover, the District of Columbia's in banc decision in *Illinois Bell*, which was affirmed by the Supreme Court in *Florida Power*, also placed heavy emphasis on the nonsupervisory character of the work performed by the disciplined supervisors (487 F.2d at 1155-1157):

> Here the supervisors were not fined because they gave directions to the work force, interpreted the collective bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union.

(continued)

here conflict with the Supreme Court's [illegible]ment o[illegible] s[illegible]ervisor-member's conflict of loyalties. While the Supreme [illegible]rt did note in *Florida Power* that Congress had exempted supervisors from the Act's definition of employee, thereby permitting employers to discharge supervisors who remained loyal to their union, the Court was not holding that unions could lawfully engage in unrestricted coercion of those employers who allowed their supervisors to retain union membership. Rather, the Court's reference to an employer's right to insist that its supervisors refrain from union membership pertained to the Board's argument in *Florida Power* that employers would be deprived of their supervisors' full loyalty if unable to compel them to perform rank-and-file nonsupervisory work during a work stoppage. See 417 U.S. at 805-813. However, as shown *supra* pp. 20-21, the Court clearly recognized that an employer is entitled to the protection of Section 8(b)(1)(B) when a union disciplines its supervisors for performing their regular management functions. See also *Illinois Bell supra*, 487 F.2d at 1169-1170. Indeed, the Union's argument is clearly untenable, since if *Florida Power* intended that an employer's power to discharge union supervisors was the exclusive manner of dealing with the conflict of loyalties problem it would have been unnecessary for the Court to formulate its test for determining when union discipline of supervisors violated Section 8(b)(1)(B). See *supra* p. 20.

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[20] (continued)

They were fined because they performed production work in the bargaining unit during a strike. Their employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act.

In any event, the Court's treatment of the conflict of loyalties problem in *Florida Power* can have no application in this case. For the Court's analysis there is expressly based on the assumption that supervisors could resign their union membership thereby obviating the problem. Here, of course, the Union flatly refused to permit hyphenates to resign their membership. In these circumstances, the Board correctly observed (A. 96) that the Union certainly cannot deny the hyphenates "the right to resign from the Membership, and thus be free of the obligations of Memberships, while at the same time argue that because the hyphenates continued to be members they cannot be free from the normal discipline imposed upon strike breakers."

Finally, the Union also contended before the Board that its threats and discipline were lawful because the hyphenates' performance of (a)-(h) editorial functions constituted rank-and-file work. However, as noted *supra*, p. 8, the Union had previously agreed in the 1970 collective bargaining contracts that the performance of the (a)-(h) functions by a producer, director, or a story editor "shall not constitute such person a writer" as to fall within the scope of the agreement. It is well-settled that where, as here, the exact boundaries of the bargaining unit are not set forth in a Board certification, the past practice and agreement of the parties will be given substantial weight in determining whether certain individuals or job functions are within the bargaining unit. See *N.L.R.B. v. Local Union No. 3, I.B.E.W. (N.Y. Telephone)*, 339 F.2d 145, 147-148 (C.A. 2, 1964); *N.L.R.B. v. Local 1291, I.L.A. (Pocahontas Steamship)*, 368 F.2d 107, 110 (C.A. 3, 1966), cert. denied, 386 U.S. 1023; *N.L.R.B. v. Local 825, Int'l Union of Operating Engineers (Nichols Electric)*, 326 F.2d 213, 217 (C.A. 3, 1961). Here, whatever amount of writing was

required to perform the (a)-(h) functions, the parties plainly viewed it, not as nonsupervisory bargaining unit work, but as a normal part of the duties of the producers, directors, and other supervisors.

Furthermore, the (a)-(h) functions do not involve any substantial writing; to the contrary, they involve perfunctory editing of finished written scripts required by unforseeen contingencies or technical problems that arise prior to completion of the finished film. Where changes of a substantial nature are required they are made by writers pursuant to the terms of the union's contract (A. 70-71; Tr. 360, 619, 668-671, 984-986). Moreover, even if the (a)-(h) functions did constitute rank-and-file work, the hyphenates who crossed picket lines during the strike performed only a minimal amount of (a)-(h) writing incidental to their primary functions as executives, producers, directors, and story editors; the instant case would thus still be clearly distinguishable from *Florida Power* where the disciplined supervisors performed exclusively rank-and-file struck work rather than their regular supervisory functions during the strike. See *Hammond Publishers Inc., supra,* 216 NLRB No. 149, 88 LRRM at 1380-1381.

II. THE BOARD DID NOT ABUSE ITS DISCRETION BY REFUSING TO ORDER ADDITIONAL REMEDIAL MEASURES REQUESTED BY THE EMPLOYERS, INCLUDING EXTRA-ORDINARY PUBLICATION OF THE REMEDIAL NOTICE AND REIMBURSEMENT OF EXPENSES INCURRED DURING INTRA-UNION DISCIPLINARY HEARINGS.

Before the Board, the Employers requested certain remedial measures in addition to those ordered by the Board. Specifically, the Employers requested that the remedial notice be read at two consecutive Union membership meetings, that the notice be published for three weeks in local as

well as trade newspapers,[21] and that the notice identify the primary capacities of the involved hyphenates. The Employers also requested that the Employers and the hyphenates be reimbursed for expenses incurred in defending the hyphenates' interests during the intra-Union disciplinary hearings. As shown below, the Board properly refused the Employers' requests for these extraordinary remedies.

The courts have long recognized that the Board possesses both the authority and the expertise to determine the appropriate remedy for an unfair labor practice. As the Supreme Court held in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964):

> [Section 10(c)] "charges the Board with the task of devising remedies to effectuate the policies of the Act." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . . ." *Phelps-Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. Labor Board*, 319 U.S. 533, 549.

Accord: *Amalgamated Local Union 355 v. N.L.R.B. (Russell Motors)*, 481 F.2d 996, 1006-1008 (C.A. 2, 1973); *Lipman Motors, Inc. v. N.L.R.B.*,

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[21] The Board ordered the Union to publish the notice in two trade papers for six consecutive days (A. 111).

451 F.2d 823, 828-829 (C.A. 2, 1971); *Herald Co. v. N.L.R.B.*, 444 F.2d 430, 436-437 (C.A. 2, 1971).

The Board's order here effectively remedies the Union's unfair labor practices by specifically enjoining the repetition of the unfair labor practices or any related misconduct. Any resumption of the unlawful activity would thus expose the Union to the full range of contempt sanctions which this Court may invoke to secure compliance with its judgments. *Containair Systems Corp. v. N.L.R.B.*, 521 F.2d 1166, 1173-1174 (C.A. 2, 1975); *Russell Motors, supra,* 481 F.2d at 1007.

The Board's order also removes the effects of the Union's unfair labor practices by directing the Union to undertake a wide variety of affirmative remedial actions. Thus, the Union is ordered to rescind all discipline imposed upon the hyphenates, to expunge all references to the discipline from the Union's records, and to notify the disciplined hyphenates in writing that these actions have been taken. The Union is further ordered to reimburse the disciplined hyphenates for any fines levied against them. Finally, to eliminate any coercive atmosphere which the unfair labor practices may have created within the membership and throughout the industry the Union is ordered to post an appropriate notice for sixty days at the Union office and meeting halls, to mail copies of the notice to all Union members who received the original strike rules, and to publish the notice in six consecutive issues of both the Hollywood Reporter and the Daily Variety.

Contrary to the Employer's contentions, the relief ordered in the instant case extends beyond the conventional remedies that the Board traditionally imposes in cases involving Section 8(b)(1)(B) violations. See

N.L.R.B. v. Silver Bay Local Union No. 962 (Alaska Lumber), 498 F.2d 26, 29 (C.A. 9, 1974). In such cases the Board generally orders only that the offending union rescind the discipline, expunge references to the discipline from its records, notify the disciplined individuals of these actions, and post a copy of an appropriate notice.[22] In the instant case, by contrast, the Board also required the Union to mail the remedial notice to each Union member and to publish it in two leading trade publications for six consecutive days. The Board's order therefore reflects a careful tailoring of the remedy to fit the circumstances surrounding the Union's violations, as well as a firm commitment to erase all effects of the unfair labor practice.

In any event the Employers have clearly failed to show that the Board's refusal to order requested additional remedies is so egregious that it amounts to an abuse of the Board's broad discretion to select remedies. *Fibreboard Paper Products Corp. v. N.L.R.B., supra,* 379 U.S. at 215-216; *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 612 n. 32 (1969). Thus, the requests that the notice be read at two Union meetings, that it be published in the Los Angeles Times, and that it be published in the trade

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22 *Sheet Metal Workers, Local No. 361 (Langston),* 195 NLRB 355, 358 (1972), enf'd, 477 F.2d 675 (C.A. 5, 1973); *Meat Cutters Union Local 81 (Safeway),* 185 NLRB 884, 888-889 (1970), enf'd, 458 F.2d 794 (C.A.D.C., 1972); *Dallas Mailers Union, Local No. 143 (Dow Jones),* 181 NLRB 286, 291 (1970), enf'd 445 F.2d 730 (C.A.D.C., 1971); *Sheet Metal Workers, Local Union 49 (General Metal),* 178 NLRB 139, 143 (1969), enf'd, 430 F.2d 1348 (C.A. 10, 1970); *New Mexico District Council (Horner I and II),* 176 NLRB 797, 800 and 177 NLRB 500, 503 (1969), enf'd, 454 F.2d 1116 (C.A. 10, 1972); *Toledo Locals Nos. 15-P and 272, Lithographers Union (Toledo Blade),* 175 NLRB 1072, 1082 (1969), enf'd, 437 F.2d 55 (C.A. 6, 1971); *Local 294, Int'l Bhd. of Teamsters (K-C Refrigeration),* 126 NLRB 1, 6 (1960), enf'd, 284 F.2d 893 (C.A. 2, 1960).

papers for three weeks rather than one week, constitute attempts to substitute the Employers' judgment for that of the Board concerning adequate publicity for the remedial notice. The Board's remedy clearly insures that those individuals and employers affected by the Union's action will have an opportunity to read the notice. Even assuming that the Employers' suggested remedies would prove more effective, this cannot detract from the fact that the Board's remedies will effectuate the Act's purposes and certainly does not indicate that the Board's order is arbitrary.

Equally groundless is the claim that the Board abused its discretion by denying the Employers' request that the notice identify the hyphenates by primary function rather than as "representatives for the purpose of grievance adjustment" or as "those performing supervisory, executive, or managerial functions." In view of the extensive publicity given the Union discipline and the instant Board proceedings throughout the filmaking industry, it is highly unlikely that any industry personnel reading the Board's notice would fail to understand that the notice referred to the Union's threats and discipline towards the hyphenates. The possibility of confusion is reduced even further by the notice's identification by name of the ten disciplined hyphenates who are well-known as producers, directors, or story editors within the industry (Tr. 311-312, 330-331, 398, 547, GCX 16A, p. 63, GCX 16B p. 44, GCX 16F pp. 57-58, GCX 16G p. 53, GCX 16M p. 36). Similar notices referring to "representatives" and naming the disciplined individuals have previously been adopted by the Board and enforced by the courts. See *Langston, supra,* 195 NLRB at 358; *Horner I and II, supra,* 176 NLRB at 800 and 177 NLRB at 503.

Nor was the Board acting arbitrarily in refusing to order the Union to reimburse the Employers and the hyphenates for expenses incurred defending

the hyphenates before Union trial committees. Reimbursement of litigation expenses, including legal fees, is an extraordinary remedy running contrary to established principles of American jurisprudence and usually applied by the Board only in cases involving recidivist respondents or patently frivolous claims made solely for the purpose of delaying Board proceedings. *Int'l Union of Electrical Workers v. N.L.R.B. (Tiidee II),* 502 F.2d 349, 354-355 (C.A.D.C., 1974); *Food Store Employees Union, Local No. 347 v. N.L.R.B. (Heck's),* 476 F.2d 546, 550-551 (C.A.D.C., 1973), rev'd on other grounds, 417 U.S. 1. See *Alyeska Pipeline Service Co. v. Wilderness Society,* 43 U.S.L.W. 4561 (May 12, 1975). While the Union in the instant case committed unfair labor practices which coerced and restrained the Employers, there is no evidence that the Union has previously committed similar violations or is a flagrant violator of the Act. Nor are the Union's defenses patently frivolous, particularly in view of the recent spate of decisions regarding Section 8(b)(1)(B). Cf. *Florida Power & Light Co. v. I.B.E.W., Local 641, supra; N.L.R.B. v. San Francisco Typographical Union No. 21 (Calif. Newspapers),* 486 F.2d 1347 (C.A. 9, 1973), cert. denied, 418 U.S. 905 and cases cited *supra* p. 20. Furthermore, since the disciplined hyphenates had voluntarily chosen to retain the benefits of Union membership long after being promoted to supervisory ranks and since their Employers had allowed them to retain these benefits, it is only fair that they bear the litigation expenses, although not the unlawful penalties, incidental to invocation of the Union's disciplinary machinery. As the Board here explained (A. 107-108):

> There is no question but that [the Union] deliberately used the difficult position of the hyphenates in a power play against the employers. However, the hyphenates are not entirely without responsibility in the result; for whatever their

> reasons, they had maintained membership in the Union until the very last moment. There is also no evidence that the Union did not sincerely believe that it had the right to do as it did. While sincerity does not excuse violations of the law, it has weight in considering an unusual remedy as that requested.

Clearly, neither the Board's conclusion in this regard nor its other conclusions as to remedy constituted an abuse of discretion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied and that a judgment should issue enforcing the Board's order in full.

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November, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AMERICAN BROADCASTING COMPANIES, INC., ET AL.,	)	
Petitioner,	)	
and	)	
ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,	)	
Intervenor,	)	
v.	)	No. 75-4089
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	
and	)	
ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,	)	
Intervenor,	)	
v.	)	No. 75-4121
WRITERS GUILD OF AMERICA, WEST, INC.,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 30th day of March, 1976.